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SUPREME COURT
STATE OF WASHINGTON

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NO. 83828-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DAROLD STENSON,

Appellant,

v.

ELDON VAIL, et al. ,

Respondents.

RESPONDENTS' MOTION
TO DISMISS AS MOOT
THE CLAIMS THAT THE
THREE DRUG PROTOCOL
IS UNCONSTITUTIONAL

I. IDENTITY OF MOVING PARTY

The Respondents, Secretary Eldon Vail, Superintendent Stephen Sinclair, and the Department of Corrections, through their attorneys, Robert M. McKenna, Attorney General, John J. Samson, Senior Counsel, and Sara J. Olson, Assistant Attorney General, respectfully ask for the relief designated in part II below.

II. STATEMENT OF RELIEF SOUGHT

The Respondents (the State) respectfully request that the Court dismiss as moot the claims that the three drug protocol for lethal injection violates the Washington and United States Constitutions, and dismiss as moot any appellate issues and arguments related to these claims.

III. FACTS RELEVANT TO MOTION

Stenson was sentenced to death for the murders of Denise Stenson and Frank Hoerner. *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Under the Department of Corrections' then existing three drug protocol, the execution of the sentence would occur by the intravenous injection of sodium thiopental, pancuronium bromide, and potassium chloride. Stenson filed a complaint challenging this three drug protocol for an execution by lethal injection. In his second amended complaint, counts I and II, Stenson alleged the three drug protocol would inflict cruel punishment in violation of the state and federal constitutions. CP 1164-65. Stenson alleged that instead of the three drug protocol, the Department should adopt the one drug protocol that uses only sodium thiopental. *See, e.g.*, CP 1164-65.

The superior court held a week long bench trial on these two claims. At closing argument, Stenson specifically argued the adoption of the one drug protocol would eliminate any issue of unnecessary pain:

As we said at the outset of this case, we have presented a narrow question to this Court, but we have also presented a remedy. As Dr. Dershwitz and Dr. Couper testified, the use of sodium thiopental alone eliminates the risk of any pain, unnecessary pain, substantial pain, any pain. It is simple. It is effective. It can be administered easily. Inadequacy of the team or the consciousness checks are not relevant.

As Dr. Dershwitz explained, if the team fails to administer sodium thiopental the first time, it can administer a second dose. It will take less than ten minutes. It will, in fact, cause less witness discomfort than the use of the three-drug protocol.

5 RP 914:6-19.

Stenson's counsel argued that he had "never requested in this lawsuit that Mr. Stenson should avoid the death penalty or avoid being executed." 5 RP 915:10-12. Rather, counsel argued Stenson was only seeking to have the Department adopt the one drug protocol because that protocol would not inflict any pain. 5 RP 914:6 – 915:17. Counsel for co-plaintiff Gentry similarly argued that the Department should adopt the alternative one drug protocol. *See* 5 RP 918:18 – 923:22.

At the conclusion of the trial, the superior court ruled the three drug protocol did not pose a risk of unnecessary pain and did not violate the state or federal constitutions, and the superior court entered detailed factual findings to support this ruling. CP 3191-3216.

Stenson appealed to this Court. On appeal, Stenson again argues the Department's three drug protocol is unconstitutionally cruel. Stenson argues that in place of the three drug protocol the Department should instead adopt the one drug protocol using only sodium thiopental. Stenson's Opening Brief, at 25-26 (arguing the Department should adopt the one drug protocol); Stenson's Reply Brief, at 16-17 (same).

On February 25, 2010, the Secretary of the Department of Corrections directed that the policy, Department Policy 490.200, shall be amended to adopt the one drug protocol for an execution by lethal injection. *See* Appendix A, Declaration of Superintendent Sinclair, at ¶ 2. The decision to amend the protocol was made in light of the three executions which have now been completed in Ohio using a single dose of sodium thiopental, and in light of the opinions of the experts who have advised the Department. Appendix A, at ¶ 2.

The amended policy will change the presumed method for lethal injection from the existing three drug protocol to the one drug protocol. Appendix A, at ¶ 3. Under the amended policy, the one drug protocol will be the presumed method, and the protocol will require the Department to use only sodium thiopental for an execution. Appendix A, at ¶ 3. The amended policy will require the Department to administer an intravenous injection of 5 grams of sodium thiopental, followed by a saline flush. Appendix A, at ¶ 4. The amended policy will also require an additional 5 grams of sodium thiopental be available at the time of execution in case the administration of the first 5 grams of sodium thiopental does not cause the condemned inmate's death. Appendix A, at ¶ 4. The drugs pancuronium bromide and potassium chloride will not be used in the one drug protocol under the amended policy. Appendix A, at ¶ 4.

The amended policy will allow the condemned inmate to expressly elect, in writing, an alternative to the one drug protocol for lethal injection. Appendix A, at ¶¶ 3 and 5. The inmate may expressly elect in writing to be executed by lethal injection using the three drug protocol, or to be executed by hanging. Appendix A, at ¶¶ 3 and 5. The Department, however, will not use the three drug protocol for an execution by lethal injection unless the inmate expressly elects the three drug protocol in writing. Appendix A, at ¶ 5. If the condemned inmate does not expressly elect execution by the three drug protocol or hanging, the Department will perform the execution using the one drug protocol. Appendix A, at ¶ 5.

The amended Department Policy 490.200 is currently being drafted and will go into effect prior to the next execution performed in Washington. Appendix A, at ¶ 6. The amended policy will be used for any future execution, including Stenson's execution. Appendix A, at ¶ 6. Thus, unless Stenson expressly elects in writing to be executed by the three drug protocol, the Department will execute him using the one drug protocol of sodium thiopental. The Department maintains the three drug protocol is constitutional, but because he will now be executed using the one drug protocol they said is constitutional, and in fact has requested be adopted, the claims challenging the three drug protocol are now moot. The Court should dismiss the claims and any associated issues as moot.

IV. ARGUMENT

The claims that the three drug protocol violate the state and federal constitutions were set forth in counts I and II of Stenson's second amended complaint. CP 1164-64. After the superior court denied the two claims, Stenson appealed, asserting a number of errors related to the denial of the two counts. *See, e.g.*, Stenson's Opening Brief, at 30-47. The Court should dismiss the appeal of the two claims, and any issues associated with those two claims, because the claims and associated issues are now moot in light of the decision to implement the one drug protocol for lethal injection.

Mootness can arise at any stage of litigation, including appeal. *Steffel v. Thompson*, 415 U.S. 452, 459 n. 10, 94 S. Ct. 1209, 39 L.Ed.2d 505 (1974); *Martin v. Municipality of Metropolitan Seattle*, 90 Wn.2d 39, 40-42, 578 P.2d 525 (1978). "Issues are moot when the court can no longer provide effective relief and only abstract questions remain." *In re Williams*, 106 Wn. App. 85, 99, 22 P.2d 283 (2001) (citing *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)); *In re Cross*, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983); *Mills v. Green*, 159 U.S. 651, 653, 16 S. Ct. 132 (1895); *Lane v. Williams*, 455 U.S. 624, 102 S. Ct. 1322, 71 L. Ed. 2d 508 (1982); *cf. In re Mines*, 146 Wn.2d 279, 283-84, 45 P.3d 535 (2002) (applying exception to mootness doctrine); *In re Rebecca K.*, 101 Wn. App. 309, 313, 2 P.2d 501 (2000) (same).

In this case, Stenson did not seek damages. Stenson only sought declaratory and injunctive relief, asking the Court to find the three drug protocol is unconstitutional, and to prohibit the Department from using the three drug protocol for his execution. These claims are now moot since Stenson will not be executed using the three drug protocol.

In *Cooey v. Strickland*, 588 F.3d 921, 922 (6th Cir. 2009), the State of Ohio had set a December 2009 execution date for Kenneth Biros. On October 19, 2009, the federal district court stayed the execution based on preexisting litigation related to challenges to Ohio's three drug protocol for an execution by lethal injection. *Id.* On November 13, 2009, Ohio changed its execution protocol, effective November 30, 2009, replacing the three drug protocol with the one drug protocol that involves the intravenous injection of sodium thiopental. *Id.* Ohio moved to vacate the stay of execution on the ground that the change in policy mooted the challenge to the three drug protocol. *Id.* The Sixth Circuit vacated the stay, concluding "any challenge to Ohio's three-drug execution protocol is now moot." *Id.* at 923.

Under the amended policy, Stenson will be executed using the one drug protocol. Stenson does not have to make a choice, or to elect to be executed by the one drug protocol. Under the amended policy, the one drug protocol is the presumed method, and the Department shall use the one drug protocol, unless the inmate expressly elects in writing to be executed using

the three drug protocol. Thus, Stenson will be executed using the one drug protocol, and will not be executed using the three drug protocol, unless he expressly elects the three drug protocol. As in *Cooey*, Stenson's challenge to the three drug protocol is now moot because Stenson will be executed under the one drug protocol.

Nor do the claims survive being dismissed as moot simply because Stenson may in the future expressly elect to be executed by the three drug protocol. In order to be subject to the three drug protocol, Stenson must expressly elect to be executed by the three drug protocol. "The defendant has not made that election and is therefore not facing a method of execution he believes to be cruel. He therefore lacks standing to raise this issue." *In re Benn*, 139 Wn.2d 868, 933, 952 P.2d 116 (1998) (Benn lacked standing to challenge hanging since he had not elected hanging as his method of execution).¹ Moreover, an express election of the alternative three drug protocol would waive any claim that the three drug protocol is unconstitutionally cruel punishment. *Stewart v. LaGrand*, 526 U.S. 115, 119, 119 S. Ct. 1018, 143 L.Ed.2d 196 (1999) (by electing lethal gas as his method of execution, LaGrand "waived his claim that execution by lethal gas is unconstitutional.").

¹ This Court recognized that "a change in the method of execution does not violate the Ex Post Facto Clause where the change is to a more humane method." *Benn*, 134 Wn.2d at 933 n. 19.

In addition to the fact that the claims that the three drug protocol is unconstitutionally cruel punishment are now moot, the issues associated with those claims are also moot. For example, in addition to assigning error to the superior court's dismissal of counts I and II, Stenson also assigned error to the court's pretrial rulings on discovery, an adverse inference, and the scheduling of trial. *See* Stenson's Opening Brief, at 4.² This alleged error is now moot. Similarly, Stenson's other complaints, such as the lack of a proper medical review and consciousness assessment, are now moot.

As Stenson's counsel stated during closing argument in the superior court, the adequacy of the protocol safeguards, such as the competency of the team and the adequacy of the assessment of consciousness, are no longer relevant under the one drug protocol. *See* 5 RP 914:6-14. As Stenson argued, the one drug protocol, "It is simple. It is effective. It can be administered easily. Inadequacy of the team or the consciousness checks are not relevant." 5 RP 914:11-14. Under the one drug protocol, "the use of sodium thiopental alone eliminates the risk of any pain, unnecessary pain, substantial pain, any pain." 5 RP 914:9-11. Since the one drug protocol does not pose the risk of any pain, these other alleged errors are now moot.

² Stenson failed to present argument on this assigned error. *See*, Response Brief, at 44-46. But even assuming, *arguendo*, that Stenson did sufficiently argue this assignment of error, the alleged error is now moot since the claims underlying the alleged error are now moot.

Under the amended policy, Stenson will be executed under the one drug protocol, not the three drug protocol, because he has not expressly elected the three drug protocol. Consequently, Stenson's claims challenging the three drug protocol, and the issues associated with those claims, are now moot. The only claims remaining on appeal that are not moot are Stenson's claim that the Department lacks a proper delegation of legislative authority to develop and implement an execution policy, and Stenson's claim (set forth in count III of the second amended complaint) that the Department violated state and federal controlled substances laws by acquiring sodium thiopental without a prescription. *See* Stenson's Opening Brief, at 27-30 and 47-49.³

As Stenson argued in the superior court, he asked only that he be executed by the one drug protocol for lethal injection. As Stenson argued, the adoption of the one drug protocol would eliminate the allegedly unnecessary pain because the protocol would not use the two drugs that would allegedly inflict pain – pancuronium bromide and potassium chloride. As Stenson argued, the adoption of the one drug protocol would render irrelevant his concerns about the competency of the lethal injection team, and his concerns about other safeguards, are no longer relevant.

³ Stenson also appeals from the post-judgment ruling awarding costs for transcripts of depositions. Because the claims and issues addressed the trial are now moot, and the costs awarded were incurred as a result of the trial, the State agrees that the costs awarded for the transcripts should be vacated. This agreement will moot this issue on appeal.

The Department has now adopted the one drug protocol, and Stenson will be executed under this one drug protocol. As found by the superior court, the three drug protocol is a constitutional method of execution. The Department maintains that the three drug protocol is constitutional. However, because Stenson will be executed using the new one drug protocol, the claims and issues on appeal concerning the three drug protocol are now moot. The Court should dismiss the claims and issues as moot.

V. CONCLUSION

For the reasons set forth above, the State respectfully requests that the Court grant the motion, and dismiss as moot Stenson's claims that the three drug protocol are unconstitutional, and also dismiss as moot any issues associated with the claims.

DATED this 2nd day of March, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

BY RONALD R. CARPENTER

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parties or their counsel of record as follows: CLERK

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EXECUTED this 21 day of March, 2010, at Olympia, Washington.


SHAUNNA CARTER

APPENDIX A

DECLARATION OF STEPHEN D. SINCLAIR

I, STEPHEN D. SINCLAIR, make the following declaration:

1. I am currently employed as the Superintendent of the Washington State Penitentiary (WSP). I have been employed in this position for over one year. Prior to assuming the position of Superintendent, I was employed as an Associate Superintendent at WSP for 3 years. I have worked for the Department of Corrections (the Department) for 21 years.

2. The current execution policy, Department Policy 490.200, Capital Punishment, requires that an execution by lethal injection be performed by the intravenous injection of three drugs, sodium thiopental, pancuronium bromide, and potassium chloride. On February 25, 2010, the Secretary of the Department of Corrections, Eldon Vail, directed me to begin amending Department Policy 490.200, Capital Punishment, to change the protocol for any future execution. The decision to amend the protocol was made in light of the three executions which have been completed in Ohio using a single dose of sodium thiopental, and in light of the opinions of the experts who have advised the Department.

3. The policy will be amended to change the presumed method for lethal injection from the existing three drug protocol to the one drug protocol that uses only sodium thiopental. Under the amended policy, the one drug sodium thiopental protocol will be the presumed method for an execution in Washington. The condemned inmate will be executed using the one drug protocol unless the inmate expressly elects, in writing, to be executed by lethal injection using the three drug protocol, or the inmate expressly elects, in writing, to be executed by hanging as an alternative method of execution.

4. The amended policy will require the Department to administer an intravenous injection of 5 grams of sodium thiopental, followed by a saline flush. The amended policy will also require the Department to have an additional 5 grams of sodium thiopental available at the time of execution in case the administration of the first 5 grams of sodium thiopental does not


cause the condemned inmate's death. The drugs pancuronium bromide and potassium chloride will not be used in this one drug protocol.

5. The amended policy will allow the condemned inmate to expressly elect in writing an alternative to the one drug protocol for lethal injection. The condemned inmate may expressly elect, in writing, to be executed by the three drug protocol, using the intravenous injection of sodium thiopental, pancuronium bromide, and potassium chloride. Alternatively, the condemned inmate may expressly elect, in writing, hanging as an alternative method of execution. The Department will not use the three drug protocol or hanging unless the inmate expressly elects one of these alternative methods, in writing. If the condemned inmate does not expressly elect execution by the three drug protocol or hanging, the execution will proceed using the one drug protocol.

6. The amended Department Policy 490.200 is currently being drafted and will go into effect prior to the next execution performed in Washington. The amended policy will be used for any future execution, including the executions of Darold Stenson, Cal Brown, and Jonathan Gentry. A copy of the amended policy will be provided to the Court as soon as it is signed by the Secretary or his designee.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED this 1st day of March, 2010, at Walla Walla, Washington.


STEPHEN D. SINCLAIR